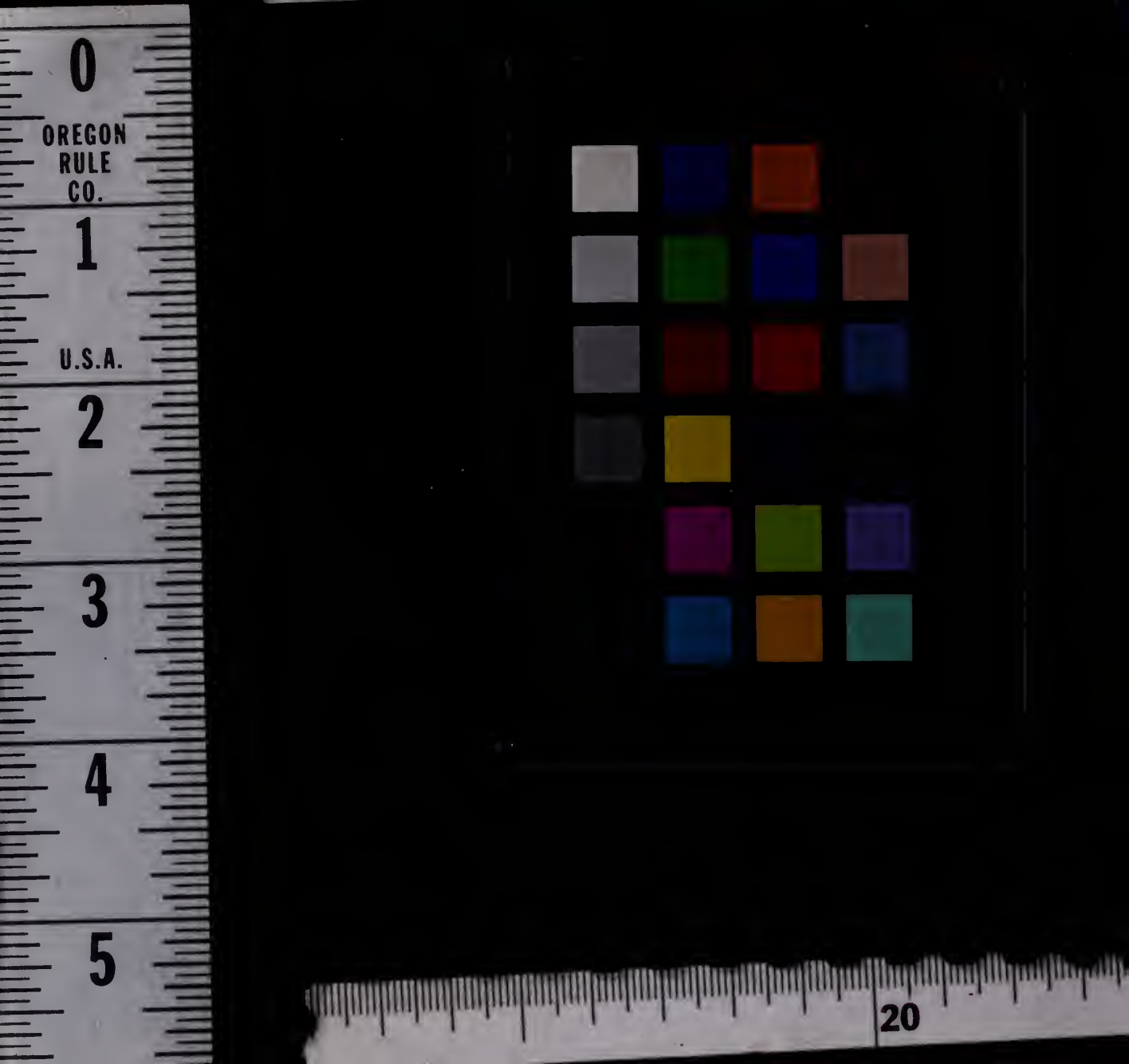
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 629.

ALGER HISS,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHESTER T. LANE,
ROBERT M. BENJAMIN,
HELEN L. BUTTENWIESER,
Counsel for Petitioner.

March, 1953

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ALGER HISS,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Alger Hiss, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 30, 1953, affirming an order entered by the United States District Court for the Southern District of New York on July 22, 1952, which order denied a motion by petitioner for a new trial on the ground of newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure.

Opinions Below

The opinion of the District Court (R. 286a-303a) is reported at 107 F. Supp. 128. The Court of Appeals affirmed the order of the District Court per curiam on the opinion below (R. 304).

Jurisdiction

The judgment of the Court of Appeals was entered on January 30, 1953 (R. 305). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1), and Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Whether the District Court's treatment of the evidence tendered by affidavit demonstrated such predetermination as to constitute an abuse of discretion calling for reversal on appeal; and

2. Whether the District Court, in disposing of the motion without granting petitioner's request for a hearing at which oral evidence in support of the motion might be introduced and the Government's witnesses in opposition subjected to cross-examination, deprived petitioner of a right to which he is entitled under federal criminal law.

Rule Involved

Rule 33, Federal Rules of Criminal Procedure, reads in pertinent part as follows:

> "The court may grant a new trial to a defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment * * *."

Statement

Petitioner was convicted [1] in the United States District Court for the Southern District of New York on an indictment in two counts alleging violation of the perjury statute, 18 U. S. C., Section 1621, and on January 25, 1950, he was sentenced to five years' imprisonment on each count, the sentences to run concurrently. The judgment of conviction was affirmed by the United States Court of Appeals (185 F. 2d 822), and a petition to this Court for a writ of certiorari was denied (340 U. S. 948). Petitioner began service of his sentence on March 22, 1951, and is now confined in the United States Penitentiary at Lewisburg, Pennsylvania.

On January 24, 1952, within the two years limited by Rule 33 of the Federal Rules of Criminal Procedure for the making of motions for new trials based on the ground of newly discovered evidence, petitioner made such a motion in the United States District Court for the Southern District of New York (R. 4a). The motion was heard by Judge Henry W. Goddard, the judge who had presided at the trial resulting in the conviction, and was denied (R. 303a) on affidavits and memoranda submitted on both sides and after argument of counsel (R. 245a-285a) held on June 4, 1952, but without any hearing of the witnesses proffered by petitioner in support of the motion or of the witnesses proffered by the Government in opposition. Under General Rule 10 of the District Court for the Southern District of New York, effective March 1, 1952, Judge Goddard's opinion, filed on July 22, 1952, constituted the order of the court, and no separate order was entered.

Appeal from Judge Goddard's order resulted in affirmance by the Court of Appeals on the opinion below, without separate opinion (R. 304). By special request of the Gov-

[1] Conviction was on a second trial, the jury having disagreed on a first.

ernment the appeal was heard by the same panel of three judges as had considered the original appeal (185 F. 2d 822).

The outlines of the original perjury case against petitioner may be briefly stated.[2] The charge of the indictment was that, in testimony before a grand jury on December 15, 1948, petitioner had lied when he said that neither he, nor his wife in his presence, had ever turned over to Whittaker Chambers or to any other unauthorized person any documents of the State Department or of any other Government organization or any copies of such documents (R. 5a-6a). The sole human witness to the falsity of the alleged perjurious statement was Whittaker Chambers, who testified that from early 1937 to April 15, 1938, he and petitioner, the latter then being in the employ of the Department of State, were jointly engaged in an espionage operation pursuant to which petitioner made a practice of delivering to Chambers State Department documents, or copies, extracts, or summaries, for photographing and transmittal to the Soviet Union. Chambers's testimony alone being insufficient to support a perjury conviction (see *Weiler* v. *United States,* 323 U. S. 606), the Government undertook to corroborate his testimony by offering in evidence a set of four handwritten and forty-three typed documents (known as the Baltimore Documents) which Chambers identified as having been given to him by petitioner in the course of their alleged joint espionage operation. These documents were shown to be copies, extracts, or summaries of original State Department documents bearing dates from January 5 to April 1, 1938. In addition, the Government introduced two developed microfilm strips containing photographs of other State Department documents, the originals of which Chambers claimed had been given to him by pe-

[2] The motion, the appeal, and this petition, deal only with Count I of the indictment, it being in effect conceded by the Government and by the courts below that if evidence warranting a new trial under Count I were produced the conviction under Count II could not stand.

titioner for microfilming. These exhibits—the Baltimore Documents and the microfilm strips—Chambers claimed to have put in an envelope which he gave for safe-keeping to his wife's nephew in 1938 and which the latter had kept hidden over a disused dumbwaiter until November 14, 1948, when Chambers recalled its existence and found in it its long-forgotten contents.[3]

As to the four handwritten documents (which were brief memoranda concededly in petitioner's handwriting) and the microfilmed documents, there was no showing beyond Chambers's own testimony that they had been given to him by petitioner. To provide the necessary corroboration for Chambers's story the Government introduced expert testimony that all but one of the forty-three typed documents had been typed on the same machine as had been used to type certain other documents concededly typed by Mrs. Hiss (or by her sister) on the Woodstock typewriter owned by the Hisses in the 1930's.

In addition, there was introduced in evidence at the trial a Woodstock typewriter—serial #N230,099—which appeared to be the machine owned by the Hisses in the 1930's and given away by them to the family of their colored maid in late 1937 or early 1938. This, though found after extensive search and put in evidence by the defense, was adopted by the Government as affirmative corroboration—Government witnesses as well as witnesses for the defense identified it from superficial characteristics as being the original Hiss machine; an FBI man typed on it in front of the jury to show that it worked; the prosecutor, in summation, pointed to it and said: "They [the Baltimore Documents] were typed on that machine (indicating). Our man said it was," [4] and he invited the jury to take it to the

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[3] The discovery coincided with a pre-trial deposition hearing in a libel action brought by petitioner against Chambers in September 1948.

[4] In fact, neither the Government's expert nor anyone else had so testified, but, as the quotations in the text show, the case went to the jury on the assumption that it was the Hiss machine.

jury room when they retired to consider their verdict; and the trial judge charged the jury that it was "the contention of the Government that this is the typewriter upon which Baltimore Exhibits 5 to 47 (with the exception of Exhibit 10) were typed."

There was no other corroboration at the trial.[5] Chambers's wife, Esther, testified to a social relationship between the Chamberses and the Hisses of an extent and intimacy which the latter denied; but she gave no testimony as to the nature of her husband's espionage activities, or as to petitioner's alleged participation in them. A colored maid, Edith Murray, was introduced as a Government witness in rebuttal on the last day of the second trial, to testify that while working for the Chamberses in 1935-6 she had once seen petitioner for five minutes as a visitor in the Chamberses' apartment; but she likewise contributed nothing with respect to the perjury charged in the indictment.

The newly discovered evidence offered on the motion for a new trial fell into four main categories:

1. *The Typewriter.* Though hampered by the refusal of witnesses to testify for fear of personal consequences, and by FBI possession of pertinent records, petitioner's attorneys succeeded after extensive investigation in collecting evidence which, if it could stand the test of cross-examination, would show conclusively that the typewriter in evidence—Woodstock #N230,099—could not be the Hiss family machine. This evidence showed that a genuine machine bearing that serial number would necessarily have had a different type-style, and would have been manufactured too late to be the machine originally purchased by Mrs. Hiss's father and later given to her by him. The nature of the evidence in support of these conclusions is set forth at R. 26a-37a.

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[5] As indicated in note 2, p. 4, *supra,* we are concerned here only with Count I of the indictment.

Encouraged by this historical investigation, petitioner's attorneys submitted the machine (which had between the trials and during the second trial being impounded by order of the District Court) for examination by a well-known firm of metallurgical and chemical analysts. This first-hand examination of the machine produced expert proof, offered by affidavit, and by a tender of oral testimony (see R. 259a) which the trial court declined to hear, that the machine was not one which had worn normally since leaving the factory, but showed positive signs of having been deliberately altered, in that many of its types were replacements of the originals and had been deliberately shaped (R. 126a et seq.).

Thirdly, petitioner's attorneys undertook to expose the invalidity of the assumption underlying the Government's expert testimony regarding the typing of the Baltimore Documents—an assumption universal among document examiners (see R. 57a)—to the effect that no two typewriters could ever type alike by accident, or be made to do so by design. To this end a mechanic was retained to construct, if possible, a machine which would so precisely duplicate the typing of another as to defy detection. He did so, working solely from samples of the typing from the machine he was duplicating, and as demonstration of the success of the experiment there were filed in support of the motion a set of thirty samples indiscriminately typed on the two machines, without notation as to which were typed on which (see R. 59a). The document expert under whose supervision the experiment had been conducted, and whose affidavit attested the success of the experiment, offered to supply the court with a key to the samples should it be desired to check the accuracy of the results of any test to which the Government might choose to subject the samples (R. 59a). The trial court ignored even the fact that evidence demonstrating the success of the experiment had been introduced.

2. *The Baltimore Documents.* After repeated unsuccessful efforts before, during and after the second trial to secure access to the Baltimore Documents for the purpose of physical inspection and testing,[6] petitioner's attorneys finally, on March 21, 1952, received permission from the trial judge to inspect the Documents under FBI guard, as well as the envelope in which Chambers claimed to have hidden them from 1938-1948, and to take samples of the paper from each for testing purposes (see R. 138a). As a result of this inspection and testing by petitioner's experts, evidence was offered in affidavit form, and oral testimony was tendered, to show that the typed Baltimore Documents fell into two groups which could not have been kept together under the same conditions of storage over ten years, and that both groups were totally devoid of certain stains and pressure marks which would have had to appear on documents kept in the envelope in question (R. 143a-145a, 164a-167a). Furthermore, on the basis of study of the originals (as distinct from the photographs previously available) petitioner's experts were prepared to prove that the documents bore intrinsic evidence of forgery, and in particular were not typed by Mrs. Hiss, as Chambers had testified was the case (R. 143a-145a, 150a-154a, 168a).

3. *Chambers's Possession of the Baltimore Documents.* Since the State Department documents underlying the Baltimore Documents bore dates from January 5 to April 1, 1938, Chambers must, if his story were to be believed, have remained active in his espionage conspiracy until at least some few days after the latter date. He testified that he did so remain active until April 15, 1938, and that after he broke he secured a translating job from Paul Willert of the Oxford University Press.

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[6] One corner of one sheet had finally been turned over to the defense for paper analysis, over the Government's urgent objection, when the second trial was more than half through.

After long and fruitless search petitioner's attorneys succeeded in locating Mr. Willert in Europe, where he had been for many years, and offered in support of the motion his affidavit that indeed Chambers had by his own admission already broken with the Party at the time he got the translation, but that the time was not after April 1, 1938, as Chambers claimed (and had to claim if his story was to be believed), but some weeks before that date (R. 120a-122a). To confirm Willert's recollection of the date petitioner submitted copies of papers from the files of the Oxford University Press which showed that at least some, and probably the last, part of the translation had been sent to Chambers by March 18, 1938 (R. 99a, 122a).

4. *Edith Murray.* Though she contributed nothing with respect to the perjury charged in the indictment (see p. 6, *supra*), Edith Murray's testimony was invested with artificial importance by the fact that she was the sole human being produced by the Government (outside the Chamberses themselves) to support the Chamberses' version of their acquaintance with the Hisses, and further by the Government's tactic of producing her as a witness only on the last day of the trial, when her veracity could neither be practicably investigated nor adequately tested on cross-examination.[7]

Witnesses discovered after the trial were offered in support of the motion, to testify that no colored maid had worked for the Chamberses when and where Edith Murray said she had (R. 90a-95a).

In opposition to the motion the Government submitted a number of counter-affidavits (R. 170a-244a). To some

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[7] Although her existence was known to the Government well before the second trial, and she was actually in the court house at the opening of the trial, knowledge of her existence was withheld from the defense until her production as a witness on the last day.

extent these counter-affidavits created issues of fact; in other respects they left untouched the evidence proffered in support of the motion. At the argument on the motion petitioner's attorney urged upon the court the need for a hearing of the witnesses, to resolve such conflicts as had been created by the affidavits, to permit demonstration of the basis for the expert conclusions advanced in support of the motion, and to make possible the presentation of other supporting evidence not available without subpoena. Notwithstanding this request, the motion was denied solely on the basis of the affidavits and briefs and oral argument of counsel. As noted above (p. 3, *supra*), the Court of Appeals affirmed per curiam, on the opinion below.

Specification of Errors to be Urged

The Court of Appeals erred in affirming the order of the District Court, in that:

1. The District Court's order denying the motion for a new trial constituted an abuse of discretion calling for reversal on appeal; and

2. The making of the order by the District Court without first granting petitioner's request for an evidentiary hearing deprived petitioner of a right to which he was entitled under federal criminal law.

Reasons for Granting the Writ

It is elementary that the granting or denying of a motion for a new trial on the ground of newly discovered evidence lies within the judicial discretion of the trial court (*see, e.g., Prisament* v. *United States,* 96 F. 2d 865, 866 (C. A. 5th, 1938)), and that the exercise of that discretion will not be reviewed on appeal "except for most extraordinary circumstances" (*United States* v. *Johnson,* 327 U. S. 106, 111).

We respectfully submit that this case presents "most extraordinary circumstances", and that in its disposition of our appeal the court below has so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Furthermore, we believe that the court below, in affirming the trial court's refusal to grant a hearing at which oral evidence might be produced in support of the motion, and the Government's witnesses in opposition subjected to cross-examination, has decided an important question of federal law which has not been, but should be, settled by this Court.

Our appeal from the decision of the trial court was not, and this petition for a writ of certiorari is not, in the nature of a prayer that the appellate courts review the findings of the trial court as to the facts, and substitute their own judgment for that of the trial court. The grounds of our appeal to the Court of Appeals went to the heart of the question whether the trial court had given that consideration to our proffered evidence which the exercise of true judicial discretion requires. Our position below in this respect—which is also our position in this Court—will appear from the following excerpt from our brief in the Court of Appeals:

> "We intend to show on this appeal:
>
> that the trial judge misconceived the burden which the defense was required to carry in order to support the motion;
>
> that he misstated or misunderstood much of the evidence offered in support of the motion;
>
> that he passed over or neglected to consider vital elements of proof offered;
>
> that he resolved issues of fact, depending on the credibility of witnesses, uniformly in favor of the

> Government, without hearing the witnesses or permitting their credibility to be tested by direct and cross-examination;
>
> that he accepted the Government's unsubstantiated gossip and rumors as sufficient to controvert sworn statements of defense witnesses who were presented as ready and able to support their affidavits in open court;
>
> that in the face of an uncontroverted showing that evidence needed to establish the innocence of the defendant was in the possession of the FBI, or was withheld by others from the defense for fear of the FBI, he declined to permit a hearing at which the defense might be enabled to bring such evidence out into the light.
>
> "However decorously we may phrase our criticisms of the trial court's action, they will inevitably be recognized as amounting to a charge of predetermination of the motion, without hearing of the witnesses and without that just and fair consideration which even once-convicted defendants are entitled to receive at the hands of our courts when evidence of a miscarriage of justice is offered. We cannot make any lesser charge. We believe that the trial court's handling of the motion displayed such predetermination, without fair hearing, as to amount to an abuse of its discretion, and thus to constitute error requiring reversal by this Court."

As regards judicial decorum, the proceedings in the trial court were conducted with full propriety. Nor were there explicit exclusions from consideration of matters proper for consideration, so as to bring the case within the language of such decisions as *Mattox* v. *United States,* 146 U. S. 140, 149, *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 482-3, *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 247-8, *Ogden* v. *United States,* 112 F. 523, 525 (C. A. 3rd, 1902), and *United States* v. *Johnson,* 142 F. 2d 588, 591 (C. A. 7th, 1944), cert. dismissed,

323 U. S. 806.[8] But the vice at which the rule stated in these decisions is aimed is not, we submit, confined to those cases where formal ruling of exclusion appears on the record; justice requires review equally when the trial court, as here, follows the more subtle tactic of disregarding vital evidence.

We say with all earnestness in this Court that the opinion of the trial court, when read carefully against the evidence actually offered in support of our motion, stands revealed as an intricately woven tissue of excuses to justify a fixed determination—i. e., that in no circumstances must Alger Hiss be allowed a new trial—rather than a reasoned statement of the considerations leading to an exercise of true judicial discretion based on the evidence presented.

We cannot in this petition diagrammatize the improprieties of the trial court's action; we can only illustrate.

For example:

The Baltimore Documents themselves, and the envelope in which they were supposed to have been stored, were first made available to the defense for study and analysis by direction of Judge Goddard at an informal conference in his chambers on March 21, 1952.[9] The consequent study led to the tender of proof, by experts of unquestioned competence and disinterest, that the documents could not have been stored together in the envelope over the dumbwaiter: that they fell into two groups which could not have been

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[8] In the last cited case the rule was stated by Mr. Justice (then Circuit Judge) Minton as follows:

> "In determining whether or not the trial court abused its discretion, we consider not only the things which it considered as exhibited by the record in this court, but we consider also whether it improperly excluded from its consideration anything that should have been considered."

[9] See n. 6, p. 8, *supra*.

kept together under the same conditions of storage over ten years, and that both groups were totally devoid of certain stains and pressure marks which would have had to appear on documents kept in the envelope in question (R. 164a-167a).

Here, on this crucial point, the court could find no answer on the merits in the Government's opposing affidavits. But the evidence must somehow be excluded from consideration:

> "This purported new evidence of the defense regarding the condition and storage of the documents cannot be regarded as newly discovered evidence. Moreover, the documents were submitted to the jury which considered and passed upon this issue" (R. 294a).

Such a statement is absolutely incomprehensible. The judge who wrote these words was himself the same judge who, for the first time, on March 21, 1952, directed the Government to let the defense examine and test the documents. If evidence first discovered after, and as a result of, that direction is not "newly discovered", surely words have lost their meaning. And how, conceivably, can the jury be supposed to have "considered and passed upon" an issue created by evidence not known or available at the time of the trial, or presented to the jury thereat?

Again to illustrate:

The typewriter experiment is described in the Statement (*supra,* p. 7). To demonstrate its success, and consequently the fallacy underlying the Government's expert testimony regarding the typewritten documents at the trial, we filed with the trial court samples from the two machines, so that our proof would not be limited to the opinion of our expert that the typing from the two machines would be indistinguishable. Again, this proof would be embarrassing; accordingly, it is simply disregarded. The court quotes

at length a concession by the defense expert that, having been intimately concerned with the development of the experimental machine, she would still herself be able to detect a small number of distinguishing characteristics; but of the fact that she had attached to her affidavit samples from the two machines to show that other experts not so acquainted with the machine would be unable to differentiate their products, *there is not one word.* Our proof is, in the truest sense, simply excluded from consideration.

A further illustration:

Paul Willert, Vice President of the Oxford University Press in New York in 1938, was prepared to testify in support of the motion that a considerable time before March 18, 1938, he had given Chambers a translation to do, and that at the time he gave Chambers the translation Chambers was already, by his own admission, "in fear of his life as he was being hunted by the G.P.U." (R. 121a). Since eighteen of the State Department communications underlying the typed Baltimore Documents did not come into existence until after March 18, 1938, it must follow that, if Willert's recollection of the date when Chambers got the translation was correct, Chambers could not have gotten those documents from Hiss as part of his alleged espionage conspiracy when and how he said he had. And to confirm the accuracy of Willert's recollection of the date we presented copies of papers from the files of the Oxford University Press showing that at least some part of the manuscript was sent to Chambers for translation on March 18, 1938.

At the trial Chambers had testified that he got the translation from Willert only after he had broken with the Party. Our proof that Chambers got the translation well before he said he did was so compelling that the Government itself conceded on the record on the motion (R. 204a) that "Chambers erred by approximately one month"; and the trial court accepted the concession (R. 300a). Yet

our proof is disposed of by the casual answer that Chambers's testimony as to when he took the translation was "an approximation" and "a statement in reference to a collateral incident."

The sworn statement of a reputable witness, that when he gave Chambers the translation—a date which the Government and the trial court now accept as being at least as early as March 18, 1938—Chambers was already out of the Communist Party, is totally ignored.

We must on this petition content ourselves with illustrations, even though no few selected illustrations can possibly convey the full flavor of the trial court's abuse of the record. Before this Court, if the writ is granted, we shall seek to show in detail the factors which demonstrate the trial court's predetermination of the motion—its outright disregard of vital evidence in the manner described above, its distortion of evidence it did consider,[10] its denial of a hearing at which such conflicts as were posed by the affidavits could be resolved by examination and cross-examination of the witnesses.[11]

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[10] For instance, in the course of investigation into the history of the typewriter, the defense secured an affidavit from one Carlson, a vice-president of the Woodstock Company, stating certain facts regarding its date of manufacture. Further inquiry revealed that the facts stated in the affidavit were erroneous, and Carlson retracted it. The Government itself refers to the affidavit as having been later identified as "merely the speculation of some unnamed clerk" (R. 190a). But the court, without mentioning the retraction, treats the affidavit as "an affidavit for the defense", and relies on it to controvert other proof offered to support the motion in one of its most important aspects (R. 295a).

[11] *Cf. Glasser* v. *United States,* 315 U. S. 60, 87, suggesting the impropriety of declining to hear evidence offered in support of a motion for a new trial, at least in certain circumstances. *Cf.* also *Hamilton* v. *United States,* 140 F. 2d 679, 681 (C. A. D. C., 1944): "An affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused. Ambiguities should not be resolved in favor of the prosecution without inquiry of the proposed witnesses."

The contrast between the attitude of the Court of Appeals in approaching an ordinary criminal case and its attitude in this case is

And we shall also seek to show the impossible, and improper, burden to which the trial court held the petitioner. Under the rule of the *Berry* case [12] it was incumbent on petitioner to tender evidence "so material that it would probably produce a different verdict, if a new trial were granted;" but this can scarcely be held to mean that the evidence must elucidate every detail of Chambers's machinations or demonstrate petitioner's innocence beyond peradventure. Under instructions which would be given by the court on a new trial a jury would have to acquit if the evidence presented raised in their minds a reasonable doubt as to petitioner's guilt. See *Coates* v. *United States,* 174 F. 2d 959, 960 (C. A. D. C., 1949).

To make this concrete: we tendered evidence that the trial exhibit Woodstock was a demonstrably fraudulent machine; and we offered evidence also as to how such a machine could have been constructed. To this the court answers that we must nevertheless fail because we cannot prove that Chambers in person constructed it and planted it on the defense (R. 296a-297a).[13] But if the trial exhibit is

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illustrated by *United States* v. *Krulewitch,* 167 F. 2d 943, 950 (1948), where the failure of the trial court to hold an evidentiary hearing on a motion for a new trial was held excusable only by the fact that the affidavit upon which the motion was based had been repudiated by the person making it, and it did "not appear that any reason was given him [the trial judge] to believe that further investigation would add evidence to support the motion."

[12] *Berry* v. *State,* 10 Ga. 511, 527. Although we shall assume for purposes of this petition that the rule of the *Berry* case governs, we reserve the right to argue, if the writ is granted, that the more lenient rule of *Larrison* v. *United States,* 24 F. 2d 82 (C. A. 7th, 1928), is more properly applicable. See *United States* v. *Johnson,* 327 U. S. 106, 111, n. 5.

[13] The court also recites "the absence of *any* proof * * * that #230,099 is not the Hiss machine" (R. 297a). So far as this is a statement of fact, it is simply not true. The discretion of a trial court to decide questions of fact on conflicting evidence cannot be enlarged into a discretion to assert that there was no evidence when there was; and a court which indulges such an impropriety demonstrates its own bias.

a fraudulently made up machine, there could be no conceivable innocent explanation for its injection into the case, and no question but that a jury must from that fact retain at least a reasonable doubt as to petitioner's guilt. This test, which we believe to be that established by authority, the trial court has completely ignored.

Of the reasoning of the Court of Appeals, which affirmed the decision of the trial court, we can say little beyond what is said above regarding the trial court's opinion; for the Court of Appeals affirmed on the opinion below, without separate opinion of its own. We may suggest that the Court of Appeals, although it did not follow the form of dismissing the appeal on its own motion, may nevertheless have thought itself to be following the substance of this Court's decision in *United States* v. *Johnson,* 327 U. S. 106, in which the courts of appeals were enjoined to decline review when "sought on the alleged ground that the trial court made erroneous findings of fact" (327 U. S. at 111). If so, we would suggest that the decision of the Court of Appeals represents a misapplication of the views of this Court; for the vice of the trial court's action lies not so much in its erroneous findings as in its failure to weigh the evidence before it fairly and without prejudgment, and its denial of opportunity to test the affidavits by oral testimony under cross-examination—in its virtual abdication of all save the form of the judicial function. We cannot suppose that the *Johnson* case was intended to bar review in such circumstances.[14]

What we have said so far has been designed to persuade the Court that the trial court so far departed from the ac-

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[14] Plainly, the decision of this Court in the *Johnson* case was in part motivated by concern lest motions for new trials and appeals from denials thereof might lend themselves "for use as a method of delaying enforcement of just sentences", and by belief that that case was a clear indication of the danger (327 U. S. at 112-113). We may point out that there is no such danger in the instant case, petitioner having already served nearly two years of his sentence.

cepted and usual course of judicial proceedings that the decision of the appellate court in sanctioning the proceedings below calls for an exercise of this Court's power of supervision. This would be so, we believe, regardless of the subject matter of the case—if it were one involving an unknown, convicted of a common crime. Yet we may beg leave to suggest that it is just because the victim is not an unknown, and because the substance of the crime charged against him was so outrageous, that the judicial process has failed to live up to its responsibilities on this motion. The Court needs no reminder that the name of Alger Hiss has become a household word, a synonym for betrayal in high office; that the story of his crime, and fear of its duplication by others, have become so inextricably woven into the fabric of our country's social and political thinking that only judicial courage and independence of the highest order would dare now to disturb it. That courage, that independence, we respectfully submit, have not been found in the action of the trial court on this motion.

Herein, in part at least, lies the special importance of review by this Court in this case. We view with profound dismay the disastrous effect which this case has had upon the morale of Government employees, upon freedom of thought for the unorthodox, indeed upon the very sanity of our body politic. No single event in the history of our country, we venture to suggest, has dealt so savage a blow to the hitherto proud and advancing cause of civil liberties. If Hiss were guilty this would be tragic enough; if, as we believe, the new trial to which we are convinced petitioner is entitled would lead to his acquittal, the tragedy, public as well as private, is shocking.

We urge the Court not to allow the disposition of this proceeding below to stand.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

March, 1953

The Hecla Press : : New York City

[2306]